For these reasons I am of opinion that the appeal should be allowed, but as the alleged over-weight is so great as to seem to exclude any possibility that there was no excess weight, I order that the case be sent back for retrial, evidence being called to show that in November, 1947, the machine used was accurate and that it still is, and also that the method of computing the weight is correct.

Appeal allowed, conviction and sentence set aside and a retrial ordered.

A similar order is made in respect of Criminal Appeal No. 5 of 1948.

Appeal Allowed.
Retrial Ordered.

BAHRU ZAMAN BIN ALI v. PUBLIC PROSECUTOR

[App. Crim. Juris. (Storr, J.) July 17, 1948]
[Ipoh — Criminal Appeal No. 55 of 1948]

Penal Code Ss. 406 and 409 — Criminal breach of trust — Denial of receipt of money — Dishonest misappropriation.

In this case the appellant was convicted of criminal breach of trust of money entrusted to him as clerk in the Parcels Office, Malayan Railways. The evidence was that a passenger handed 50 cts. to appellant as demurrage charge but was not issued any receipt for the payment. When appellant was subsequently questioned he denied receiving the money. On appeal it was argued **inter alia** (a) that there was no evidence of misappropriation and (b) that the money was not due to the Railway and therefore there could be no criminal breach of trust of it.

Held, (1) that the denial of the receipt of money proved to have been received by an accused person is evidence of dishonest misappropriation; (2) that when money is given to any person in his official capacity, whether he has any right to take it or not, he is entrusted with it within the meaning of S. 406 of the Penal Code.

Cases referred to:—

(1) *R. v. Jones* 7 C & P. 834.
(2) *R. v. Creed* 1 C & K. 63.
(3) *Public Prosecutor v. Abdul Wahab* (1938) F.M.S.L.R. 151; (1939) M.L.J. 247.

CRIMINAL APPEAL FROM DISTRICT JUDGE.

T. Rajendra for the Appellant.

M. G. Neal (Federal Counsel) for the Respondent.

Storr, J.: — The Appellant was charged before the District Judge, Ipoh:—

> That you on 17/5/48 at Ipoh, being a public servant employed as a clerk in the Parcels Office, Malayan Railways, and in such capacity entrusted with certain property, to wit, cash 50 cents collected from one Leong Yee Pun as cloak room charges, committed Criminal Breach of Trust with respect to the said property, and that you have thereby committed an offence punishable under Section 409 Cap. 45.

convicted and sentenced to 7 months simple imprisonment. He has appealed against both sentence and conviction.

The facts briefly were that the Appellant was a parcels clerk in the Malayan Railways. His duties, *inter alia*, was to hand over parcels to passengers who produced duplicate Waybills for Luggage and other Articles accompanying Passengers (Tfc. 399), and, if necessary, charge demurrage or "cloak room" fees and issue receipts for same. On the 17th May of this year one Leong Yee Pun went to the Parcels Office, Ipoh Railway Station, saw the accused and handed him Ex. P.1, a duplicate "Waybill for Luggage and other Articles accompanying Passengers" to prove his ownership to the goods stated therein. The Appellant handed him the articles and was handed 60 cents by Leong Yee Pun being three 20 cent notes for a 50 cents demurrage charge demanded by Appellant for the night 16/17 at 10 cents per article. He was given 10 cents change but no receipt for the 50 cents. This transaction was witnessed by Railway Detective Sergeant 166, who immediately went up to Leong Yee Pun and asked if he had received any receipt for the money paid. He received a negative reply and they both went to see the Senior Assistant Traffic Superintendent, Mr. Foley, who, after questioning Leong Yee Pun, went to the Parcels Office and questioned Appellant. Appellant denied absolutely receiving 50 cents or any sum from Leong Yee Pun, and that, in effect, was his defence to the charge. However, Mr. Foley found $1.50 in one corner of his drawer and three 20 cent notes which made 50 cents over the amount shown by the Appellant's books to be there. The Appellant was arrested and charged.

I accept the facts as found proved by the learned District Judge.

In the Appeal, Mr. Rajendra relied mainly on three points. Firstly, that there was no evidence of misappropriation as the money, even according to the prosecution story, remained in the railway drawer used by the Appellant and the action of the prosecution was premature. Secondly, that in any event, according to the Tariff Rules, the money was not due to the Railway and therefore there could be no criminal breach of trust of same, and, thirdly, there were discrepancies in the evidence.

As to the first point submitted by Mr. Rajendra, it is quite clear on the English authorities that the denial of the receipt of money proved to have been received by an accused person is evidence of dishonest misappropriation [*R. v. Jones*[1] and *R. v. Creed*[2]]

and as regards the second point, in view of the fact that the goods were in fact carried with the passenger as luggage, I consider the charge of demurrage could properly have been made, and in view of the judgment of Murray-Aynsley J. in *Public Prosecutor v. Abdul Wahab*[3] with which I agree, and which states *inter alia:* "I am of opinion that when money is given to any person in his official capacity, whether he has any right to take it or not, he is entrusted with it within the meaning of the section" (Section 406 Penal Code), the only possible difference had I agreed with his submission would be to alter the conviction to one under Section 406 Penal Code.

The discrepancies pointed out by Mr. Rajendra were only minor ones and do not go to the root of the charge and do not in any way affect the case. I therefore consider that the appeal from the conviction must be dismissed.

As regards sentence, Mr. Rajendra pleaded that the Appellant was of good character, young, and came from a good home. Of course he did, otherwise he would not have been placed in a position of trust, i.e. of parcels clerk in the Railways receiving money from the public. He further said the amount was only a small amount.

The Appellant had ample opportunity of putting forward an explanation as to how the excess 50 cents came to be in his drawer. However, he did not do so but in the face of the money having been found in his drawer preferred to brazen out a complete denial of the charge. A public servant who is in a position of receiving money direct from the public must be above suspicion. He is put there because of his integrity, and if he fails in his duty he must be severely punished. I see no reason in this case for altering the sentence of the learned District Judge. The appeal against sentence therefore is also dismissed.

Appeal Dismissed.

NG TAI HOE AND 9 ORS. v. YAU WAH FONG AND ANOR.

[App. Civil Juris. (Pretheroe, Ag. C.J., M.F., Murray-Aynsley, C.J., S., Russell, J.) June 5, 1948]

[Ipoh — Civil Appeal Nos. 9 & 10 of 1947]

Japanese Judgments and Civil Proceedings Ordinance, 1946, s. 3 — Power of Court to set aside a judgment of an inferior Court and the circumstances in which such power can be exercised — Courts Enactment (Cap. 2) s. 25.

The ten appellants in this appeal together with the Respondent, who is also the Appellant in Civil Appeal No. 9 of 1947, were the defendants in Civil Suit No. 63 of 2603 being sued therein for a declaration to set aside the sale of certain land. The Japanese Judge dismissed the claim of the applicant-respondent. On the 6th of February, 1947, the applicant-respondent commenced proceedings by way of motion before the Court of a Judge asking for leave to appeal against the decree of the Japanese Court. After filing the motion the applicant-respondent gave notice to the appellants of an amendment by which he sought to have the decree set aside. That notice was accepted and the motion came before the learned Judge on that basis, the motion being made under section 3 of the Japanese Judgments and Civil Proceedings Ordinance 1946 on four grounds: (1) that the Japanese Judge incorrectly recorded the issues or that he omitted all reference to collusion and fraud; (2) that there were no written grounds of Judgment and that therefore it was difficult to know what the Japanese Judge really decided; (3) that the applicant-respondent's principal witness made a mistake in his evidence; and (4) that the appellants had failed to register their transfer to Khong Hoong the 2nd respondent and that this fresh evidence tended to prove fraud. The learned Judge set aside the Japanese decree solely upon the second ground without going into the merits of the case heard by the Japanese Judge and from this decision the appellants appealed.

Held, (1) that an application under the Japanese Judgments and Civil Proceedings Ordinance 1946 to set aside a decree must be based on one of the grounds set out in sub-section 4 and if that ground is established, the Court may make any order as in the circumstances of the case may seem just; (2) that the fact that an issue which could have been raised at the trial was not in fact raised is no ground for setting aside a judgment; (3) that a judgment may be oral and as it did not appear that the plaintiff was prejudiced by the absence of written grounds of judgment the learned Judge was wrong in setting aside the judgment on that ground; (4) that in the circumstances, to grant leave to appeal would in any case be a waste of time and money and would be asking the Appellate Tribunal to attempt the impossible.

Cases referred to:—

(1) *Low Say Peng v. Teruvengadam,* 5 F.M.S. L.R. 29.

(2) *Murugappa Chetty v. Seenivasagam and others,* (1936) F.M.S.L.R. 33.

(3) *Robins v. National Trust Company,* (1927) A.C. 515.

(4) *Gem Milling Co. v. Robinson,* 3 T.L.R. p. 71.

(5) *Tan Ah Boon v. The State of Johore,* (1936) M.L.J. p. 187.

CIVIL APPEAL.

Appeal from the decision of Evans J. reported in (1948) M.L.J. 8.

Dato Roland Braddell (*H. T. Ong* with him) for the Appellants.

E. D. Shearn (*F. J. Bryant* with him) for 1st Respondent.

D. K. Walters (*Tan Cheng Hock* with him) for the 2nd Respondent.